

## UNITED STATES DISTRICT COURT

## DISTRICT OF MINNESOTA

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In Re: Bair Hugger Forced Air ) File No. 15-MD-2666  
Warming Devices Products ) (JNE/DTS)  
Liability Litigation )  
September 6, 2018  
Minneapolis, Minnesota  
Courtroom 9E  
9:00 a.m.  
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BEFORE THE HONORABLE DAVID T. SCHULTZ  
UNITED STATES MAGISTRATE JUDGE

**(MOTIONS HEARING)**APPEARANCES

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## P R O C E E D I N G S

(9:06 a.m.)

THE COURT: Good morning, everyone. Please be seated.

All right. We are on the record in the Bair Hugger Forced Air Warming Devices, MDL Number 15-2666. Will counsel for the plaintiff note your appearance for the record, please?

MS. ZIMMERMAN: Yes, Good morning, Your Honor. Genevieve Zimmerman for plaintiffs, and a number of my colleagues are in trial right now and they send their regrets that they're not able to be here this morning.

THE COURT: Good morning, Ms. Zimmerman. For the defendants?

MS. YOUNG: Good morning, Your Honor. Mary Young for the defendant.

THE COURT: Good morning, Ms. Young.

MR. GOSS: Good morning, Your Honor. Peter Goss for the defense.

THE COURT: Good morning, Mr. Goss.

MR. HULSE: And good morning, Your Honor. Ben Hulse.

THE COURT: Good morning, Mr. Hulse. I hope you don't mind sitting on the bench.

MR. HULSE: Not at all.

1 THE COURT: All right. So I take it, Ms. Young,  
2 you'll be arguing the motion?

3 MS. YOUNG: Yes, Your Honor.

4 THE COURT: Go ahead. Beware or be aware I have  
5 read everything, so go ahead when you're ready.

6 MS. YOUNG: Thank you, Your Honor. So as Your  
7 Honor knows then at issue today is defendant's motion to  
8 strike two of the three case specific experts that  
9 plaintiffs have disclosed for the Axline trial on  
10 December 3rd. Neither of these experts have offered case  
11 specific opinions related to the plaintiff, and defendants  
12 move to exclude their testimony as untimely and improper.

13 Before discussing the specific experts, I just  
14 wanted to highlight two over-arching points. First, as Your  
15 Honor knows, discovery in this MDL is bifurcated by the  
16 Judge and that what that bifurcation means has become a  
17 point of contention really for the first time on this  
18 motion.

19 Defendant's position, a position we believe was  
20 shared by the Court or is shared by the Court and was shared  
21 by the plaintiffs up until now, is that general causation  
22 discovery covered issues related to all of the cases that  
23 cross cut the cases in the MDL. General causation certainly  
24 is one of those issues, but it also applies to other issues  
25 that would apply equally to other plaintiffs in this case.

1           On the other hand, we have case specific expert  
2 disclosures. And those case specific experts were intended  
3 to be bellwether case specific and to offer opinions  
4 specific to a plaintiff's case. The Court had an exchange  
5 with plaintiff's counsel on this very issue where the  
6 distinction was clear the Court asked plaintiff's counsel,  
7 "who do you foresee being a case specific expert?" And in  
8 response, plaintiffs essentially said it would be an  
9 anesthesiologist or an orthopedic surgeon who would be  
10 offering a case specific opinion.

11           So that distinction, Your Honor, general  
12 causation, general issues versus the case specific issues,  
13 that bifurcation has been made in the case and has been  
14 clear. Plaintiffs now on this motion argue for the first  
15 time that the general causation discovery meant something  
16 different. That it was a floor for the experts and that  
17 once their experts cleared that hurdle in the Daubert  
18 motions, they could now go ahead and offer new non case  
19 specific expert opinions at the bellwether stage. We  
20 fundamentally disagree with that distinction. And it would  
21 be contrary not only to bifurcation of discovery, but it  
22 would undermine the streamlining that the Court has done so  
23 that this MDL can move forward. The Court allowed general  
24 causation, general issues to proceed first so that the  
25 Daubert issues could be addressed and resolved and then we

1 are at a point now where bellwether cases need to be worked  
2 up efficiently and effectively. Allowing this new  
3 definition and to undermine the bifurcation would create a  
4 never ending cycle of expert discovery where you have non  
5 case specific issues being introduced and having to be dealt  
6 with in a specific bellwether case. And so at the outset,  
7 we think that is a fundamental issue that brings this  
8 motion.

9 While that is a distinction that's the backdrop,  
10 Your Honor, it really just is the backdrop here. The Court  
11 does not need to for the issues before Your Honor today, the  
12 Court doesn't need to grapple with the broader issues that  
13 plaintiffs are trying to interject here. Issues like what  
14 if we get to a point where a general causation expert can no  
15 longer participate? Inevitably, in an MDL we'll probably  
16 get there, we're not there today. So this isn't about this  
17 must be the case that we can never have new general  
18 causation experts. That is not what we are talking about  
19 here today. At this stage, we're only looking at the  
20 specific opinions offered by Dr. Bushnell and Dr. David and  
21 whether those two experts have offered proper opinions in  
22 the Axline case under the federal rules and under the  
23 Court's schedule.

24 THE COURT: Okay. Keep going.

25 MS. YOUNG: Thank you, Your Honor. Turning then

1 to Dr. Bushnell. Dr. Bushnell is a computational fluid  
2 dynamics expert offered to rebut defendant's rebuttal  
3 computational fluid dynamics expert Dr. John Abraham. There  
4 is nothing in his report that relates to Ms. Axline, and he  
5 says nothing about causation. His entire report is an  
6 improper sur-rebuttal report that provides hyper technical  
7 critiques of Dr. Abraham's CFD. It's really, Your Honor,  
8 just a rehash of the extensive cross-examination that  
9 plaintiffs have already done of Dr. Abraham. And no doubt a  
10 cross that's been informed by Dr. Bushnell because he sat  
11 through 14 hours of Dr. Abraham's deposition and certainly  
12 informed plaintiff's cross-examination of him, and they also  
13 cross examined him at trial.

14 So, Your Honor, this report violates the Court's  
15 Scheduling Order, which does not provide for sur-rebuttal  
16 reports, and Judge Noel made that very clear when he  
17 expressly denied plaintiff's prior request for likely this  
18 very sur-rebuttal report from Dr. Bushnell. Therefore, the  
19 report violates both Rule 16 and Rule 37, and it should be  
20 excluded here at trial as a sanction.

21 Plaintiffs have tried to recharacterize  
22 Dr. Bushnell as an impeachment expert. Defendants are not  
23 aware of any support for the notion that there is such a  
24 thing as an impeachment expert. The expert is clearly  
25 rebutting our rebuttal expert, and Judge Noel unequivocally

1 said there will be no replies to rebuttal experts. What you  
2 get are reports on issues where you prepare the burden of  
3 proof, a rebuttal, and deposition, and that has all happened  
4 here with respect to the CFD experts.

5 THE COURT: Let me ask you this, in general, as I  
6 understand the sort of dialogue that went on between the  
7 Court and counsel, the sequence was initial report, rebuttal  
8 report, depositions. And if the initial reporting expert  
9 had a response or a rebuttal to the rebuttal expert's  
10 report, that that was permitted to be offered and explored  
11 in the context of their deposition but that that -- so to  
12 the extent that there is any sort of sur-rebuttal, if you  
13 will, that was the mechanism and scope, mechanism for it and  
14 scope of it. Am I right?

15 MS. YOUNG: Absolutely, Your Honor. And to that  
16 point, the points that Dr. Bushnell seeks to rebut of  
17 Dr. Abraham's were in fact explored. The CFD that  
18 Dr. Abraham, while plaintiffs are arguing some sort of  
19 impeachment expert, the CFD was presented for the first time  
20 in May of 2016 at science day. It was posted on the  
21 Internet. So there's simply nothing that either wasn't  
22 explored previously in cross exam or could not have been  
23 explored. So there is a mechanism by which this information  
24 can come into the case and is in the case.

25 So, Your Honor, for the plaintiff's failure to

1 obey, first, the scheduling order, and then Judge Noel's  
2 subsequent and very clear statement that we will not have  
3 sur-rebuttals here, plaintiff's report of Dr. Bushnell  
4 should be stricken.

5 On a broader note, Your Honor, if sur-rebuttals  
6 are allowed, that certainly does set a very different  
7 precedent for this case, for expert discovery in this case.  
8 It would make meaningless the scheduling order, the Court's  
9 statements about the scheduling order and really there would  
10 be an opening of a flood gate in every bellwether case. Is  
11 it now open season? The plaintiffs get a sur-rebuttal, and  
12 how do we deal with that mechanism?

13 THE COURT: If this were allowed, this report, the  
14 Bushnell report were allowed, what would defendant's plan be  
15 for responding to it, if you know?

16 MS. YOUNG: Well, Your Honor, I do know because  
17 we've had to comply with other deadlines in the case  
18 schedule, so we have submitted a stand alone  
19 sur-sur-rebuttal report from Dr. John Abraham and that was  
20 provided to the plaintiffs on Tuesday. And so we have  
21 already incurred, we believe, you know, harm by needing to  
22 actually engage in discovery that was clearly in violation  
23 of a Court Order. We would need to depose Dr. Bushnell. If  
24 he weren't brought here, I understand he's in Seattle and  
25 then, of course, prepare for trial with respect to his



1 testimony.

2 THE COURT: Okay.

3 MS. YOUNG: So, Your Honor, I think that's an  
4 appropriate segue way to talking about Dr. David. That too  
5 allowing his supplemental opinions, albeit for different  
6 reasons, would be also an opening of the flood gates here  
7 and would undermine the Court's bifurcation of discovery.

8 As courts have recognized, if you allow improper  
9 supplementation of expert reports, what you essentially have  
10 is no finality, and you have a back and forth on experts  
11 whether that be in an MDL or in a specific case. So under  
12 Rule 26(e), while experts do have a duty and often have  
13 proper means to supplement their reports, that is not what  
14 Dr. David has done here because he has offered new expansive  
15 opinions on alternative design. They're not proper under  
16 Rule 26(e) and should be excluded under Rule 37(c)(1). That  
17 exclusion for improper supplementation is mandatory absent a  
18 showing by plaintiffs and a demonstration of the failure is  
19 harmless or substantially justified.

20 So to set the framework for that discussion, just  
21 wanted to highlight what it is that Dr. David has done. He  
22 does not purport to offer any Axline case specific opinions.  
23 He calls it a supplemental general causation report, so on  
24 its face, we believe it's clearly outside of the context of  
25 the rules. And then what he's done is offered seven what he

1 contends to be feasible safer alternative designs for the  
2 Bair Hugger, which run the gamut from a cotton blanket to  
3 other -- to conductive warming systems. And so these were  
4 all available, I think, very significantly.

5 This isn't the type of supplementation where  
6 there's been research published in the intervening time  
7 period or information that he couldn't have known about  
8 prior. These devices were all available at the time of his  
9 prior report. And at the time of his deposition, all of the  
10 research that he relies on in claiming that they're  
11 alternative designs were available. So --

12 THE COURT: Let me stop you there for a second.  
13 It's really of, I don't think, I think it's of no sequence  
14 but you made that statement in the brief as well. And from  
15 what was submitted, I couldn't quite see that those dates  
16 lined up. You said that everything but one study was  
17 available at the time the report was issued and that the  
18 additional study that wasn't available at the time of the  
19 report was available at the time of the deposition.

20 MS. YOUNG: Right.

21 THE COURT: But in your brief, those dates don't  
22 seem to track, so what am I missing?

23 MS. YOUNG: Your Honor, so are you looking at the  
24 page 8? We talk about the disclosure of its original report  
25 on March 31, 2017, and then the availability of all articles

1 by August 1, 2017. And I see here I believe the confusion  
2 would be about the likely the latest study would be  
3 July 2016. None of them appear to be in the -- I agree with  
4 you actually, Your Honor. I see that none of them --

5 THE COURT: That's before the disclosure, right?

6 MS. YOUNG: Right, are in the intervening time  
7 period. So I will have to confirm from that, but I think  
8 the point there is, Your Honor, that he was asked in his  
9 deposition about the four alternative designs included in  
10 his initial report, and he asked do you have any other  
11 proposed alternative designs? And he said no. And so to  
12 the extent these were proposed alternative designs, they  
13 would have been known to him, available to him, and it is  
14 now improper to add them into the case where, obviously,  
15 safer alternative design has been an element of plaintiff's  
16 claims and something they bear the burden of proving since  
17 that time of his deposition.

18 THE COURT: They make the argument that honestly  
19 I'm not sure I quite understand it, so I want you to explain  
20 it to me faithfully and certainly Ms. Zimmerman gets an  
21 opportunity to explain it as well. But the argument, as I  
22 understand it, is essentially something about the Gareis  
23 trial and the pretrial motion in limine made a difference in  
24 the disclosure for Dr. David, but I'm not quite sure I'm  
25 tracking that.

1 MS. YOUNG: Your Honor, we don't agree with that  
2 statement.

3 THE COURT: I figured that.

4 MS. YOUNG: Right. So the reason is that  
5 plaintiff's now have disclosed a number of electric  
6 conductive warming blankets, and they had also disclosed an  
7 electric conductive warming blanket, the VitaHEAT UB3 in the  
8 first report. So to the extent they're claiming that  
9 knowledge about that type of device somehow changed in the  
10 intervening time period. Frankly, it didn't. The VitaHEAT  
11 order stood, and it wasn't admissible, and they've now  
12 augmented that.

13 The TableGard was part of their initial report.  
14 It was also the only alternative design presented at trial,  
15 and they have now the warm cloud alternative design that  
16 would have a similar inflatable mattress, and so the idea  
17 that that new device came in somehow because of how the  
18 Gareis trial shaped up, we're not following that argument  
19 either. And there was no evidence about then they have not  
20 even devices but they have cotton blankets, the reflective  
21 blankets, and the prewarming. None of those are devices,  
22 none of those are modifications to the Bair Hugger system,  
23 and we don't see what happened at the Gareis trial that  
24 would change their view that those somehow are proper  
25 alternative designs under the law. So our view is that

1 argument is unavailing, and we're not following what the  
2 rationale would be for it.

3 So, Your Honor, as I mentioned, the sanction  
4 should be mandatory absent a showing that it was  
5 substantially justified, and I think Your Honor's question  
6 just went to that point of whether that in fact is  
7 substantial justification. It's our view that it is not.  
8 Also, in terms of whether this is harmless.

9 If the Court were to allow an expansion of the  
10 alternative design opinions in this case, defendants would  
11 be seeking leave to reopen discovery on those issues for  
12 whatever devices would be in play and don't see that the  
13 current case schedule and a December 3rd trial date would be  
14 viable in that scenario. So those are factors that the  
15 courts do consider in looking at harmlessness.

16 THE COURT: Did the defendants in the period of  
17 time after Dr. David's report was initially issued, did you,  
18 in fact, take discovery on the alleged alternative feasible  
19 designs?

20 MS. YOUNG: So there were the four. The Court had  
21 already ruled that the VitaHEAT was not a feasible  
22 alternative design because the Bair Hugger could not be  
23 modified.

24 THE COURT: Right.

25 MS. YOUNG: Plaintiffs themselves took discovery

1 of the two forced air warming devices, the Cincinnati Sub-0  
2 and the Stryker mistral. In that intervening time period,  
3 we were satisfied with those responses so that obviated the  
4 need for defendants to seek any discovery. And then the  
5 TableGard, Dr. David was solely relying on a marketing  
6 brochure, and we made that decision at the time not to seek  
7 any additional discovery.

8 THE COURT: Okay.

9 MS. YOUNG: And so but in this case, given the  
10 breadth of these new opinions we would be seeking to reopen  
11 discovery. So we don't believe this is the type of  
12 supplementation, one, not proper to begin with; but, two,  
13 that would be considered to be harmless under the rules,  
14 which is the showing that plaintiffs are required to make in  
15 order to proceed with this design.

16 And then, Your Honor, just getting to the point of  
17 other factors that the courts look at the importance of the  
18 evidence. In our view if you propounded evidence that is  
19 not actually alternative designs that is legally viable, so  
20 you have products that have already been rejected as  
21 alternative designs, you have things that aren't devices  
22 certainly aren't modifications, that is evidence that we  
23 believe won't be coming into the trial, and we shouldn't be  
24 forced not only to spend resources developing responses to  
25 it, but then also potentially losing our trial date and

1       losing, you know, the schedule that we have here, so.

2               THE COURT: Regardless of the outcome, I think the  
3       chance of losing that trial date is virtually nil but  
4       understood.

5               MS. YOUNG: Thank you. Then we'll be very busy if  
6       we head in one direction here. So, Your Honor, it's our  
7       position that the Dr. David's improper supplemental report  
8       should be stricken and that no further discovery should be  
9       taken on it, and no evidence of those alternative designs  
10      should be allowed at trial. So unless the Court has further  
11      questions, I will rest.

12              THE COURT: Thank you.

13              MS. YOUNG: Thank you, Your Honor.

14              THE COURT: Ms. Zimmerman, I have a number of  
15      questions for you before you begin, so let me just jump to  
16      them. Regarding the Bushnell report, when was it prepared  
17      in its current form? And was that in fact the report that  
18      was the subject of the discussion with Judge Noel? I  
19      believe it was in June 15 of '17 status conference.

20              MS. ZIMMERMAN: Yes, Your Honor. The Bushnell  
21      report was prepared this summer of 2018 after the conclusion  
22      of the Gareis trial, and the defendants are certainly  
23      welcome to explore that if they choose to take his  
24      deposition.

25              THE COURT: Okay. So was it the contemplation in

1 2017 when you had this, as I understand it, a request, I  
2 don't know if it was a formal motion or not to offer or  
3 propound a sur-rebuttal report that was denied by Judge  
4 Noel, was it in fact the contemplation that it would be  
5 whether it was Bushnell or someone else a response to  
6 Dr. Abraham's?

7 MS. ZIMMERMAN: To be candid, Your Honor, I don't  
8 remember. I know that as we went through that process, so  
9 that if I can take a quick step back.

10 THE COURT: Sure.

11 MS. ZIMMERMAN: We talked about the science day  
12 and what was known about Dr. Abraham's opinions. First of  
13 all, science day was completely off the record. And there  
14 were videos, in fact, that were produced and shown to the  
15 Court in I think it was May of 2016. There were some of  
16 those videos available on You Tube, but none of the written  
17 report that Abraham has offered as supportive of his  
18 opinions in this case and also connected with the videos  
19 that are available on You Tube were produced to us until  
20 June of 2017 as a part of his rebuttal to Dr. Elghobashi.

21 So just to the extent that the Court is thinking  
22 that we had Abraham's report starting in 2016, we just  
23 didn't. We didn't have it until June of 2017.

24 THE COURT: Okay, but I'm not sure that ultimately  
25 helps the plaintiffs. If you had the report in June of 2017



1 or whenever it was, July of 2017, we're now over a year  
2 later, so I guess I'm not sure where that leaves you. I  
3 don't think it leaves you in a good spot.

4 MS. ZIMMERMAN: Well, yes, Your Honor. I mean I  
5 think a number of things have happened since that time  
6 primarily, and I wouldn't expect Your Honor to have read  
7 every single brief that has been submitted to the Court, but  
8 plaintiffs believed and continue to believe to this day that  
9 Dr. Abraham is not qualified to offer the opinions that he  
10 offered and that he did not follow an appropriate  
11 methodology. And so we moved --

12 THE COURT: But that ship sailed.

13 MS. ZIMMERMAN: It did with respect to general  
14 causation. The Court has allowed all of the experts that  
15 were disclosed to come in and offer testimony with respect  
16 to general causation issues.

17 And so fast forward to what happened in the Gareis  
18 trial, in the Gareis trial there were separate reports  
19 because it was a different machine. It was a Model 505 at  
20 issue in that case, so both Dr. Elghobashi and Dr. Abraham  
21 produced new reports for Gareis. And during the course of  
22 the trial, there were some limitations on our ability to  
23 impeach Dr. Abraham.

24 One of those limitations on our ability to impeach  
25 him actually was with respect to an order from Judge Noel

1 about whether or not his article was subject to the peer  
2 review process. That our attempt to impeach him with a  
3 Court Order was denied on hearsay grounds. So there's a  
4 number of different things that we need to do in our view in  
5 terms of impeaching Dr. Abraham.

6 What Dr. Elghobashi did with his general causation  
7 report on the Model 750 was to explain what the impact is of  
8 this particular machine on an operating room in a general  
9 way. He did not do a case, you know, he did not model each  
10 and every operating room for the 5,000 plaintiffs that are  
11 before the Court right now. So he has a report on the 750,  
12 and he has a report then on the Model 505.

13 And so with respect to what plaintiffs intend to  
14 use Dr. Bushnell for, and I will make a representation as an  
15 officer of the court, Dr. Bushnell will not be called unless  
16 and until Dr. Abraham is called to the stand again.

17 THE COURT: But, again, I mean I get that, but  
18 that just makes Dr. Bushnell's report a response to  
19 Dr. Abraham, right?

20 MS. ZIMMERMAN: That's correct.

21 THE COURT: But it doesn't make it specific to the  
22 Axline trial except for the fact that Dr. Abraham like other  
23 general causation witnesses are going to testify at that  
24 trial.

25 MS. ZIMMERMAN: Yes.

1 THE COURT: So I don't think it gets you to, and  
2 maybe you agree with this, but that's not a case specific  
3 report.

4 MS. ZIMMERMAN: Yes, Your Honor, correct.  
5 Plaintiffs concede that. So we do think that, and I think  
6 that we conceded this in our papers, that Dr. Bushnell's  
7 report is indeed a rebuttal to Abraham, but it is an  
8 impeachment rebuttal.

9 THE COURT: Let me stop you there. Impeachment it  
10 strikes me for lack of a better way of characterizing it,  
11 impeaching a witness is of course going after their  
12 credibility. Typical forms of that are you impeach them  
13 with a prior inconsistent statement, right? That's not  
14 this.

15 MS. ZIMMERMAN: Correct.

16 THE COURT: You can impeach them in essence by  
17 putting in evidence of prior criminal convictions, things of  
18 that nature. But, honestly, I've never done it as a  
19 practicing lawyer, and I haven't heard of an expert's  
20 opinion in this case, Dr. Bushnell being an -- it's not  
21 impeachment. How is it impeachment other than I just  
22 disagree with you? You're wrong.

23 MS. ZIMMERMAN: I hear the Court to say that we're  
24 wrong, and I believe that --

25 THE COURT: No, I mean that was my

1        characterization of Bushnell saying to Abraham, "you're  
2        wrong," but that's not impeachment.

3                MS. ZIMMERMAN: Right. Well, in our view, Your  
4        Honor it is impeachment. And we cite this *Peels v. Terra*  
5        *Haute Police Department* case. It's in the Seventh Circuit  
6        2001, but we thought it was helpful because it talks about  
7        how the proper function of rebuttal evidence is to  
8        contradict, impeach, or defuse the impact of the evidence  
9        offered by the adverse party.

10              And with respect to Dr. Abraham, it's not simply  
11        -- certainly what he's going to be offering is his  
12        testimony, and some of his testimony, his opinions are based  
13        on his use of a computer program to conduct various, perform  
14        equations and solve them to understand what he believes the  
15        impact is of this machine on an operating room.

16              And what Dr. Bushnell did in the 70-some pages of  
17        his surrebuttal report was to say that's not what happened.  
18        If you use this particular computer program, here are all  
19        the different ways that Dr. Abraham's opinions are wrong  
20        because the equations were not solved the way that he said  
21        that they were.

22              So I guess I understand the Court's distinction  
23        that normally you would think about impeachment as  
24        somebody's, you know, you think that they said something  
25        different somewhere else, but here I think the reason that

1 Bushnell would come in is to say, look, if you use the  
2 computer that Dr. Bushnell said he used, these results, the  
3 results he claims are not correct.

4 And so the point of Bushnell's report is to  
5 demonstrate that Abraham's opinions, they're not based on an  
6 appropriate use of the ANSYS model of the CFD. If you plug  
7 the numbers in to that particular machine, that program, the  
8 numbers don't come out the way that Abraham claims that they  
9 did.

10 And so we need to have the opportunity to  
11 demonstrate to this Court and particularly to the trier of  
12 fact, who is not in this courtroom, that what Abraham claims  
13 to have done he didn't do correctly and that is to impeach  
14 the witness. It's to impeach the witness with math and with  
15 engineering. There's other impeachment of Dr. Abraham as  
16 well, but with respect to Bushnell, that's the point of  
17 that.

18 THE COURT: Okay, let me interrupt you for a  
19 second. A couple of observations. Part of this is the  
20 imprecision of language, right? I mean the word  
21 "impeachment" has both a precise meaning that's understood  
22 if you're impeaching the credibility of a witness, but it  
23 also has a broader meaning to undermine or to whatever.

24 First of all, I read the *Terra Haute* case. To me,  
25 I think the Court was using the phrase "impeach" in a

1 broader sense. But even without that, and you just called  
2 Bushnell's report a sur-rebuttal.

3 MS. ZIMMERMAN: It's a rebuttal. I'm sorry if I  
4 misspoke.

5 THE COURT: Okay, and I don't want to, again, I'm  
6 not trying to get hung up on precise words, but I think they  
7 do matter here because I think it is fairly characterized as  
8 a sur-rebuttal, which would take it outside what is  
9 permissible in the Court. And the notion of impeaching an  
10 expert with another expert's report really I think the Court  
11 in its prior order said if you're going to do that, you have  
12 two paths for doing it. Either you have to anticipate or if  
13 it's really something that comes up in their rebuttal  
14 report, in this case Abraham's rebuttal report, you have to  
15 be prepared for that and offer it in the deposition.

16 But what is not, I don't think, proper under the  
17 Court's order is to say we're going to put in a whole new  
18 report, call a whole new expert to call it impeach, call it  
19 rebut, call it what you want, it's hard for me to see how  
20 you squeeze that into what the Court already said was the  
21 proper order of things.

22 And, frankly, if Dr. Abraham got the math wrong,  
23 it seems to me that consistent with the Court's order, you  
24 can do that one of two ways. You can cross examine him.  
25 Obviously, that puts the burden on counsel to be able to use

1 the computer program or show in some other way, but I don't  
2 think consistent with the Court's order you get to bring in  
3 an expert to do that. But, I mean, you tell me, why am I  
4 wrong on that?

5 MS. ZIMMERMAN: Well, so, Your Honor, I think  
6 that, respectfully, that it can be a difficult task to kind  
7 of understand and articulate. I think that how you and  
8 particularly because the kind of science that we're talking  
9 about is very complicated. I mean I put Dr. Elghobashi on  
10 the stand during the trial. I understand enough of what he  
11 did to try to make it accessible for a jury and explain what  
12 his model did to show the impact of this machine on an  
13 operating room.

14 Dr. Elghobashi and Dr. Abraham used completely  
15 different methods. And I think that the case law that Your  
16 Honor would look to and, frankly, the case law that  
17 defendants cite to with respect to sanctions and talking  
18 about sur-rebuttal and improper bolstering and that sort of  
19 thing, those are all really in what I would call one-off  
20 cases where it's only one trial. There's only one set of  
21 reports, and you're not going to be dealing with as we are  
22 here thousands of cases down the road.

23 So with respect to what plaintiffs are supposed to  
24 anticipate from defendant's expert report. So this isn't  
25 the case where plaintiffs thought that we lay in the weeds

1 so to speak and came back around and said, oh, geez, we  
2 didn't have a qualified enough expert to anticipate or to,  
3 you know, defeat, I guess, the other side's computational  
4 fluid dynamics expert. I mean we hired a world renowned  
5 computational fluid dynamics expert in Dr. Elghobashi, and  
6 he performed what is now a peer reviewed internationally  
7 published paper on this particular subject. And so it's  
8 certainly not that we lay back and didn't understand what  
9 the issues were. We hired a qualified expert to handle  
10 these issues.

11 The challenge becomes then how are plaintiffs  
12 afforded an opportunity to appropriately examine the  
13 opinions of the defendant's expert when we don't get  
14 obviously a detailed report with what the equations are,  
15 what the assumptions are, what the real basis of the  
16 conclusions are, and the methodology by which the experts  
17 arrived at those conclusions. We didn't get that, of  
18 course, until after we disclosed ours, and that's the nature  
19 of litigation. And I appreciate that there does need to be  
20 at some point a spot where the Court says, okay, there's no  
21 more reports, but it can't be to deny the plaintiffs the  
22 ability to show that the opinions that Dr. Abraham intends  
23 to offer to the jury are not based on appropriate  
24 methodology. They're not based on a reliable use of the  
25 ANSYS model.



1 THE COURT: Well, I think, two reactions to that.  
2 One, that gets then back to what they say, which is  
3 Dr. Abraham's study was available on science day and has  
4 been posted on the website. Go ahead.

5 MS. ZIMMERMAN: Well, his videos were, yes, the  
6 detailed reports.

7 THE COURT: Okay. And the difference being you  
8 didn't have the computer program or you didn't know what  
9 computer programming he was using?

10 MS. ZIMMERMAN: Correct. I mean we do from the  
11 first time we saw it, we thought that it was incorrect, but  
12 until we know what the inputs are, what the boundary  
13 conditions are, what the different assumptions are that he  
14 makes in generating a video. I mean I could probably go on  
15 my iPad and generate some sort of a video and say that this  
16 is what the impact is of the Bair Hugger in the room, but  
17 until somebody really has the opportunity to explore, well,  
18 you know, Ms. Zimmerman what's that based on? There's not  
19 really an ability, I mean I can put up all kinds of videos  
20 and that doesn't mean that I understand or anybody has the  
21 ability to understand what the kind of underlying basis is  
22 of the opinions of the videos I would make.

23 THE COURT: But that then leads to the second  
24 observation, which is the plaintiffs have had Dr. Abraham's  
25 reports since July of 2017?

1 MS. ZIMMERMAN: Yes, sir.

2 THE COURT: And took his deposition by August 16th  
3 of 2017?

4 MS. ZIMMERMAN: Yes.

5 THE COURT: Had an intervening trial, the Gareis  
6 trial?

7 MS. ZIMMERMAN: Then we had another round of  
8 reports and then a trial, yes.

9 THE COURT: And another round of reports is what?

10 MS. ZIMMERMAN: So the first report that we  
11 received from Dr. Abraham was limited to the Model 750,  
12 which was not at issue in Gareis, so that was produced in  
13 June of 2017. And we took his deposition I believe in July  
14 of '17.

15 THE COURT: Right.

16 MS. ZIMMERMAN: Then we had the Daubert motions  
17 and briefing in September and October. There were new  
18 reports produced on general causation issues with respect to  
19 Gareis on the Model 505.

20 THE COURT: That was allowed by Court Order,  
21 right?

22 MS. ZIMMERMAN: It was.

23 THE COURT: Okay.

24 MS. ZIMMERMAN: And those were produced in  
25 December of 2017. Depositions took place in January and

1 February and then the trial in May.

2 THE COURT: Okay. So why wasn't this all done a  
3 year ago or a half a year ago?

4 MS. ZIMMERMAN: Respectfully, Your Honor, because  
5 we believe that Dr. Abraham would and should be excluded on  
6 Daubert based on his testimony at deposition.

7 THE COURT: But that testimony in deposition that  
8 you're relying on to be the basis, hopefully, of a Daubert  
9 motion is stuff that took place in early '18 or in the  
10 summer of '17?

11 MS. ZIMMERMAN: Summer of '17.

12 THE COURT: So, but, I mean you do see the issue,  
13 right?

14 MS. ZIMMERMAN: I do see some of it, yes.

15 THE COURT: Okay. So you had this problem you  
16 thought existed. You think the Court got it wrong,  
17 shouldn't have allowed the opinion in, but I mean that's  
18 literally over a year ago. So I mean to me that seems like  
19 another hurdle you're facing even if the Court were inclined  
20 to allow it, we're essentially on the eve of the Axline  
21 trial.

22 MS. ZIMMERMAN: Absolutely, Your Honor. And so I  
23 think that maybe this is one of the reasons that it's  
24 important and why we included, you know, probably a very  
25 basic recitation of what is an MDL and why are we here and

1       where are we headed? So if these trials are to be useful to  
2       the Court and to the parties in understanding where we head  
3       and when we head there, we need to be able to try a complete  
4       case, a complete case involving warnings and conduct and  
5       negligence and all of those things, and that's going to be  
6       subject to motions that are I believe coming down the river  
7       I guess.

8               But we shouldn't be doomed to do the same exact  
9       trial again because, and that I guess is one of the reasons  
10      to have a rebuttal report from Dr. Bushnell. You know, in  
11      addition as we read various case law, we were concerned that  
12      we wouldn't be allowed to call Dr. Bushnell in rebuttal at  
13      trial of the Axline matter if we haven't disclosed a report  
14      from him. Although, under the Court's scheduling order  
15      we're not allowed to disclose a rebuttal report.

16             So we thought particularly because he's not going  
17      to be -- he would be providing, we think, real substantive  
18      evidence if he's asked to come to rebut and impeach  
19      Dr. Abraham, it's going to be based on math and science and  
20      the application of the engineering software to the facts as  
21      Dr. Abraham claims to have used them, that that's going to  
22      be a real piece of evidence that's important in Axline and  
23      should we have called, you know, Dr. Bushnell without an  
24      expert report or attempted to do so in Gareis? Perhaps.  
25      Perhaps we should have.

1 THE COURT: Okay, but yeah, in response to the  
2 general comments about MDLs, I agree with you, obviously,  
3 that one of the whether it's the desired function or the  
4 reality of bellwether trials is, you know, obviously, you  
5 try and assess your likelihood of success and the value of  
6 your cases, that, obviously, has its place. But there's  
7 also the function you mention, which is you go through one  
8 trial and both sides figure out what lessons they've learned  
9 and how to better present the evidence in the next trial.

10 And I agree with you, maybe there's additional  
11 evidence that should be considered by either side to present  
12 in the next trial, but there's a gap between that, which is,  
13 at least in my view, the function of case specific expert  
14 testimony and case specific discovery, and we're going to go  
15 back, and we're going to reconfigure the playing field by  
16 reinvestigating, if you will, sort of the general issues  
17 that are common to all cases. That can't be the function of  
18 a bellwether trial in an MDL because then it is purely  
19 chaotic, and we don't achieve efficiencies.

20 And the argument I'm hearing is, essentially,  
21 well, now we have, we've come up with a better, in our view,  
22 a better way of attacking Abraham and that may well be true,  
23 and that may well be sort of hard reality that you're  
24 limited in how you go about that, but I don't know that the  
25 cure for that issue is to just throw out the Court's very

1 clear in my mind distinction between general causation and  
2 case specific causation, and its admonition that there are  
3 no sur-rebuttal reports.

4 And so I mean I understand your argument, but I  
5 think the logical extension of that is that none of this  
6 stuff that was done in advance to be across the board has  
7 any force and effect to it.

8 MS. ZIMMERMAN: So, Your Honor, if I may, I'll  
9 offer just a couple of reactions and observations. I agree  
10 with you that there have been discussions between the party  
11 and the courts about this use of sur-rebuttal reports and is  
12 that appropriate? But one thing that is we, obviously, have  
13 a difference of opinion as to what is general causation?  
14 And I bring that up because as we think about what are we  
15 going to do with this next trial and, you know, case  
16 specific issues and that sort of thing? What there is  
17 certainly not that I'm aware of anywhere in any of the case  
18 management orders is some sort of edict or proclamation or  
19 limitation that plaintiffs will be limited in all ways for  
20 all experts in each of the individual cases to both the  
21 experts and the opinions that were offered in the general  
22 causation phase.

23 And in our responsive briefing we cited to a  
24 number of different courts that really talk about the  
25 definition of general causation and that's really is this

1 particular device capable of causing the harm the plaintiffs  
2 claim? Is there reliable evidence of that? Because if  
3 there isn't, we should stop right now, and we shouldn't put  
4 the Court through the trouble and the defendants through the  
5 trouble. We should stop; and that's really what the point  
6 is of general causation. We're past that.

7 And, frankly, jumping ahead, but Dr. David's  
8 report really probably doesn't touch on general causation at  
9 all, right?

10 THE COURT: Right.

11 MS. ZIMMERMAN: Because it doesn't address the  
12 issue about whether the machine --

13 THE COURT: Right, I want to stay on Bushnell  
14 because to me they present different issues, and they are  
15 different types of reports. But whether the Court used the  
16 phrase "general causation" in its strictest sense or not, I  
17 don't think it did, but I think it was also very clear that  
18 expert testimony that would be cross cutting a wide swath of  
19 cases. In other words, something that's not, well, let me  
20 ask it this way:

21 I am assuming that if this report were allowed,  
22 you're not, the plaintiffs aren't taking the position that,  
23 oh, we're only going to call Dr. Bushnell in the Axline  
24 trial, right? I mean you're not going to concede that it's  
25 only relevant to the Axline trial?

1 MS. ZIMMERMAN: I think that that's correct, Your  
2 Honor. I mean, if, and we said this in our papers, if  
3 Dr. Abraham comes, Dr. Bushnell is what we're going to use  
4 to show that he just -- he's not telling the truth about  
5 what he did.

6 THE COURT: But that wasn't my question,  
7 respectfully. My question is, you know, the plaintiffs,  
8 there's no question that Dr. Abraham, whether or not his  
9 report is any good or it's just pure junk and whether or not  
10 it should be allowed into evidence at any trial on down the  
11 road, there's no question that it was timely disclosed.

12 And if he's allowed to testify, the defendants are  
13 saying we're going to put him on the stand in this next  
14 bellwether and the one after that and the one after that,  
15 and I'm not hearing the plaintiffs say, well, we're going to  
16 call Bushnell but only in Axline because it's not Axline  
17 specific.

18 MS. ZIMMERMAN: Yes, Your Honor. However, so we  
19 have reports, and I brought copies if you'd like them.  
20 Ms. Young alluded to them, at least two of the reports that  
21 we've got from defense counsel this week, both from Abraham  
22 and from Dr. Mont, are repeat with general causation  
23 opinions. And we highlighted for Your Honor the general  
24 causation opinions that are in Abraham's report. These are  
25 all rebuttals to Elghobashi, again, and Elghobashi didn't



1 write a report for Axline.

2 Abraham has submitted an additional report on  
3 Axline that tries to rebut Elghobashi and also touches on  
4 some Axline specific issues, and then a second  
5 sur-sur-rebuttal report to Dr. Bushnell, which I would note  
6 for the Court I think points out that there really isn't  
7 prejudice. They've had the opportunity to explore his  
8 opinions and rebut them, and he's been offered for  
9 deposition. And the same thing is happening with respect to  
10 Dr. Mont.

11 So I guess the question the plaintiffs would have  
12 then is if general causation is both the floor and the  
13 ceiling for both plaintiffs and defendants, will Dr. Wenzel  
14 be called to the stand? He's the infectious disease doctor  
15 that the defendants disclose in the general causation phase.  
16 He hasn't provided a report in Axline. Can we compel him to  
17 come to testify to the trial in Axline and any subsequent  
18 plaintiff? We'd like to.

19 But so I guess this is the reason that I think  
20 that the words really do make a difference. You know, what  
21 is general causation? What was intended as we went through  
22 that phase? From the plaintiff's perspective, that general  
23 causation phase was really to do some permitted discovery  
24 about general causation issues and then, and because there's  
25 a number of things that we wanted to get into that we were

1 not allowed to get into, and then to get into the case  
2 specific workup.

3 So if we had changed the caption, if we had  
4 changed the caption and instead of saying for Dr. Bushnell,  
5 say that this is Axline specific, and say that he's going to  
6 offer the following as impeachment if he's called during  
7 Axline, would that be permitted?

8 THE COURT: No, that wouldn't change it. I agree  
9 with you, but the point is his opinions are, the plaintiff  
10 isn't saying this is only relevant to the Axline case, which  
11 I think you've conceded, and I get that. I understand  
12 you're really making a different argument.

13 What I'm saying is that as I understand the  
14 Court's prior orders, if you want to have Dr. Bushnell  
15 testify in the Axline trial, what you would have to do is  
16 have Dr. Bushnell or Dr. Elghobashi, or however you  
17 pronounce it --

18 MS. ZIMMERMAN: Well done, Your Honor.

19 THE COURT: -- actually model the Axline surgery  
20 suite and run computational fluid dynamics computational  
21 fluid dynamics in that suite, and then say given the  
22 particulars of that surgery suite X follows or Y follows or  
23 what have you. And so I mean I think the issue just simply  
24 comes down to this is a rebuttal to nothing that is newly  
25 disclosed. It's beyond the time period for general

1 causation reports, and the gist of the argument is but we  
2 regret not having or we think this is a better way to  
3 approach it, but it still seems to me to run afoul of the  
4 Court's order.

5 MS. ZIMMERMAN: So I think that from the  
6 plaintiff's perspective, we disclosed this report in an  
7 abundance of caution anticipating we will have a rebuttal  
8 case in Axline and potentially in other cases and that that  
9 rebuttal case after the close of defendant's, you know,  
10 evidence, assuming that they have called Dr. Abraham, then  
11 we would call Dr. Bushnell to explain why it is that  
12 Dr. Abraham's testimony is not reliable and should be  
13 discarded by the jury.

14 We have now taken an extra step ahead of time to  
15 explain in great detail what his specific criticism will be  
16 of Abraham. If the Court wants to set aside the report and,  
17 you know, and they don't want to take his deposition in  
18 advance of the trial in December. And, you know, I don't  
19 see any reason, I understand that they complained about  
20 whether or not the Court should have to consider a Daubert  
21 motion on Dr. Bushnell, we could set all of that aside. The  
22 plaintiffs still have the opportunity under the rules to  
23 have a rebuttal case. And what we have tried to do in  
24 disclosing this particular report is identify for the Court  
25 and for defendants this is what our rebuttal case will look

1 like. And, respectfully, we don't see anything in the  
2 Court's order even where it says there's not rebuttal  
3 reports that denies the plaintiffs a rebuttal case. And in  
4 fact, we don't think that that would be permitted under the  
5 rules.

6 So it's fine with us if we all want to say that,  
7 oh, this wasn't disclosed or you don't want to depose him,  
8 that's fine. But in December, when they rest, we're going  
9 to call him if Abraham came. And we want to make sure that  
10 there's not an argument made at that time that this is a  
11 surprise to them for the first time or that they haven't  
12 been able to explore his testimony.

13 THE COURT: Right. No, my comments earlier about,  
14 you know, you've had the reports since 2017 notwithstanding.  
15 I agree with you that certainly if your intention is to  
16 attempt to call Dr. Bushnell to testify, it was prudent to  
17 disclose a report.

18 Where you and I part company, I think, is in two  
19 places. One, I don't think this is impeachment, at least  
20 not in the form that one doesn't have to disclose it,  
21 because I agree with you that impeachment, real impeachment,  
22 true impeachment doesn't have to be disclosed, and it's not  
23 in the form of an expert opinion, number one.

24 Number two, I think that, you know, the ultimate  
25 extension of your argument is that Judge Ericksen and Judge

1 Noel, the Court, just got it wrong and has denied you  
2 somehow due process by allowing for an initial report and a  
3 rebuttal report and no sur-rebuttal reports. That's the  
4 ultimate extension of your argument, and I for one am not  
5 going there, so but...

6 MS. ZIMMERMAN: Certainly understood. I think  
7 that from the plaintiff's perspective, respectfully, where  
8 we think that the Court got it wrong was on Daubert. And I  
9 understand that that ship with respect to Gareis is awaiting  
10 the Court's decision with respect to our motion for a new  
11 trial. And, you know, at some point, we'll maybe go to the  
12 Eighth Circuit, and we'll find out, you know, we got the law  
13 wrong. That's certainly a possibility, maybe even a  
14 probability.

15 But I think that the plaintiffs really do think  
16 that this is -- it is closer to a normal impeachment. And I  
17 know that it gets complicated because it's not the same as,  
18 you know, you claim to have been somewhere you weren't, and  
19 we're going to bring in someone who says they saw you there  
20 that day in a criminal case. It's much more complicated  
21 than that.

22 This is really impeachment to say you say your  
23 calculator did, you know, one times two, and it came up with  
24 this answer, but we have your calculator. We have the same  
25 program, and we know if we put those numbers in, it doesn't

1       come up with the number you claim.

2               So I know that it's more complicated, and I  
3       appreciate that the plaintiffs may have a different  
4       position, and the Court may see it differently, but that's  
5       why we see this as a real impeachment witness, that we would  
6       bring Dr. Bushnell to show that Dr. Abraham's calculator is  
7       wrong.

8               THE COURT: That would limit his opinions if  
9       allowed to a very narrow, right? A very narrow scope?

10              MS. ZIMMERMAN: Yes. I mean Dr. Bushnell, if he  
11       were allowed, would come to speak only about what it is that  
12       Dr. Abraham claims to have done with his ANSYS program and  
13       what those results would show if the same numbers were put  
14       into the actual calculator and what is generated from there.  
15       That's the only purpose of Dr. Bushnell.

16              THE COURT: Okay. So, let's talk about Dr. David  
17       for a second.

18              MS. ZIMMERMAN: Sure.

19              THE COURT: So this isn't a question of whether  
20       it's an improper sur-rebuttal. It's really -- it's a  
21       question of whether this is a proper supplementation of his  
22       original report.

23              MS. ZIMMERMAN: Yes, Your Honor.

24              THE COURT: Right? And at least as I hear the  
25       defendants, maybe you disagree, but it seems to me all of

1       these devices existed at the time of the initial report, all  
2       of the studies on which Dr. David relies either existed at  
3       the time of his original report or at the time of his  
4       deposition. So in terms of at least as I understand the  
5       supplementation rule, there's nothing new here, and so,  
6       again, I'm struggling to see why this is proper  
7       supplementation?

8               MS. ZIMMERMAN: Thank you, Your Honor. I  
9       appreciate the opportunity to present to the Court on this.

10              I think that this supplement of Dr. David is  
11       particularly important as we think about it in context of  
12       this broader MDL. And the reason that I say that is that  
13       there are different requirements for what a plaintiff needs  
14       to prove from a reasonable alternative design perspective,  
15       whether you're applying Minnesota law, Wisconsin law, Iowa  
16       law, which is maybe what's going to apply to Axline. South  
17       Carolina law, which is what did apply in Gareis or any  
18       number of the other states.

19              So while the plaintiffs certainly disclosed  
20       Dr. David's report in the general causation phase to  
21       demonstrate, look, there are a bunch of alternatives. There  
22       are other products on the market that have warnings,  
23       warnings just like the Bair Hugger used to have, and for  
24       some reason, this product doesn't have anymore.

25              You can use cotton blankets. You can use all

1 manner of different products, all of which are known to the  
2 defendants and have been for a long time. I've attached, I  
3 think, as Exhibit 6 just a color coded sheet that  
4 demonstrates what the defendants have thought in terms of  
5 who is out there? What's safe? What's effective? They've  
6 got it pretty easily figured out here in a green, blue, red  
7 schematic.

8 But, and I did want to make one point with respect  
9 to counsel's comments that these are totally different  
10 products. Certainly, the prewarming with the Bair Paws,  
11 that is defendant's product. It is the exact same  
12 application of the exact same technology. The only thing  
13 that happens there is that it's done before an operation and  
14 that the warming therapy has stopped prior to an incision.  
15 And according to the defendant's own documents, and I think  
16 it's at Exhibit 1 of our motion, and I think I got that  
17 wrong.

18 Pardon me, Your Honor. It's Exhibit 3,  
19 demonstrates that the defendants have known this for quite  
20 some time, certainly well before Axline, certainly well  
21 before the vast majority of cases have been filed in this  
22 MDL.

23 So that is certainly not a different technology.  
24 It is the defendant's own technology, and they're own  
25 documents say that that is an effective way to warm patients



1 and that it avoids the kind of risks we're talking about  
2 here. And that you can see in the chart where they  
3 summarize the pros and cons of using the Bair Paws  
4 prewarming versus the Bair Hugger during an operation. And  
5 they say contraindicated in orthopedic surgery, they say the  
6 Bair Paws avoids things like nosocomial infections and  
7 contamination of the sterile field. These are the most  
8 critical issues before this Court.

9 So it's not that they didn't understand about  
10 pre-warming as an alternative therapy. And with respect to  
11 different kinds of technologies like cotton blankets, for  
12 example, those have been around for a very, very long time,  
13 and according to their own chart, that's the safest way to  
14 go, and it's the most effective, and it's the most widely  
15 used.

16 So I think that the issue is not which  
17 technologies were known and when because these technologies  
18 were certainly well-known to defendants, but there have  
19 been, and I think Your Honor had -- it looks like maybe you  
20 have another question --

21 THE COURT: Go ahead.

22 MS. ZIMMERMAN: I was going to talk a little bit  
23 about what happened with what I call the VitaHEAT motion.  
24 So VitaHEAT is now also owned or exclusively distributed by  
25 defendants, and it is essentially an electric blanket.

1 Plaintiffs sought to do discovery during the course of when  
2 discovery was still open, and they refused. They said it  
3 wasn't relevant because it was a different product.

4 Now, the reason that this is important is that,  
5 you know, a lot of different states, West Virginia, for  
6 example, I'm involved in the transvaginal mesh litigation  
7 out there. Illinois, certainly, and many other states when  
8 you have a device, you can look at the predicate product,  
9 the product that they say is the predicate product for  
10 getting through the 510(k) process and that that is always,  
11 always going to be an alternative design. So, and that's  
12 case law in various MDLs.

13 THE COURT: Right.

14 MS. ZIMMERMAN: But in this Court, when we sought  
15 to do discovery on VitaHEAT, and VitaHEAT, of course, claims  
16 as its 510(k) predicate device the Bair Hugger, we weren't  
17 allowed to do it. It was denied on a relevancy objection,  
18 which was, you know, granted -- it was ordered by the Court  
19 and sustained by Judge Ericksen, and we understand that, but  
20 it does impact what the plaintiffs were able to do from a  
21 discovery standpoint. And it really has, it has impacted  
22 throughout during the entire litigation.

23 Now, something changed a little bit in pretrial  
24 proceedings right before the Gareis trial this spring. And  
25 there the Court said, look, you know, you might -- this

1 whole idea that reflective technology or VitaHEAT is  
2 completely not relevant, that might not really be the case  
3 anymore. And we think that that's correct. Of course, we  
4 don't have a written order to that effect, but counsel was  
5 present when the comment was made. And it's changed kind of  
6 how we approach Gareis, and it changes how we approach  
7 Axline. And I think that what is required and allowable in  
8 all these different states really makes a difference as we  
9 think about Dr. David's report.

10 So, for example, and I won't relitigate this, but  
11 in South Carolina, you can have a reasonable alternative  
12 design even if it's a completely different product. That  
13 may not be the law in every state. And we still don't know  
14 right now whether Minnesota law is going to apply to the  
15 Axline case or is it going to be Ohio law? But there are  
16 variations throughout --

17 THE COURT: Yeah, but, again, the line you're  
18 drawing or the ultimate implication of the argument then is  
19 there's no -- there's really no such thing as a general  
20 causation or a general feasible alternative design because  
21 not, I mean that's not -- feasible alternative design isn't  
22 case specific. There's a difference between case specific,  
23 which are what are the facts of your case, and did this  
24 cause your injury in this case? That's case specific.

25 What you're positing is an argument that we only

1 have to disclose just a baseline. Here's some feasible  
2 alternative designs, and then down the road given the law in  
3 jurisdiction A, we can do a whole new opinion that discloses  
4 other feasible alternative designs. And I guess where I  
5 struggle with that is while I understand the conundrum it  
6 puts you in, it doesn't seem to be consonant again with the  
7 Court's Order, which is everything you're going to do that  
8 cross cuts cases, that is not dependent on the facts of this  
9 person's particular experience really has to be done now.

10 And so it does put a burden on the plaintiff to  
11 say, all right, some states allow a very broad definition of  
12 feasible alternative designs. Some states allow predicate  
13 devices in the 510(k) process to be alternative designs.  
14 Other states take a more narrow view, so we're going to  
15 disclose all of these alternatives, and the Court will  
16 decide in any individual case whether in the law of that  
17 jurisdiction that would be admissible or not. That seems to  
18 me to be the burden that the plaintiffs carry under the  
19 structure that this Court's put in place.

20 MS. ZIMMERMAN: So, respectfully, I don't think  
21 that that burden was clear to the plaintiffs at any point  
22 during this litigation. And it's not the same kind of  
23 burden that's placed on plaintiffs in every other MDL that  
24 I've been involved in or that I've researched where general  
25 causation reports are then applicable to the universe of

1 cases both on file at the time that they're disclosed and  
2 that ultimately join the MDL.

3 So, for example, in Minnesota there are some -- I  
4 think it's the *Kulio* case, where if a product is  
5 unreasonably dangerous or essentially there's no benefit to  
6 it, you don't even need to show that there's a reasonable  
7 alternative design. You can just say, look, this is too  
8 dangerous. We're not going to have, you know, three  
9 wheelers I think are one of the things people talk about a  
10 lot.

11 But if there is to be such an edict from the Court  
12 that the four corners of any of these reports are both the  
13 floor and the ceiling as we refer to in our motion papers,  
14 that needed to be clear, and it certainly shouldn't be held  
15 against Ms. Axline or subsequent plaintiffs down the road  
16 because if Ms. Axline could have, and I'll note by the way  
17 that this whole motion of course is styled in the MDL  
18 generally, and we keep talking about Axline because that's  
19 where we're headed next. But Ms. Axline could have had  
20 either Dr. David or I suppose a completely different  
21 engineer or specialist of some kind prepare a case specific  
22 report saying that all this is here.

23 THE COURT: I don't think so. I think by  
24 definition feasible alternative design is not case specific.  
25 I think that's where we're sort of talking past each other.

1 MS. ZIMMERMAN: Okay.

2 THE COURT: And I think the other problem you have  
3 is to the extent that the law varies from jurisdiction to  
4 jurisdiction, Dr. David's initial report took account of  
5 that because he included conductive patient warming devices.  
6 He included the VitaHEAT. But the position that you're in  
7 is the plaintiffs are saying, geez, we could have put a lot  
8 more examples into the bucket.

9 And so I don't think it's a notice problem that  
10 you didn't have notice that somehow you should identify  
11 everything that might be a feasible alternative design in  
12 the first instance, and that's what you're essentially  
13 arguing that you didn't have notice that you should have  
14 done that.

15 MS. ZIMMERMAN: Okay. Well, I think from the  
16 plaintiff's perspective, and this gets again back to the  
17 definition of general causation versus something case  
18 specific, and I think we're in agreement that for the most  
19 part a reasonable alternative design probably isn't going to  
20 be a case specific issue.

21 I do think that we have a little bit of a  
22 difference of opinion I guess on when it may be case  
23 specific and that is so for Axline, for example, she's in  
24 Ohio. I don't know if Minnesota law is going to apply or  
25 Ohio law. She's 2009. There may be some technologies that

1 are available in 2009 that aren't available before that  
2 where somebody from 2015, you know, in Wisconsin would have  
3 different alternatives.

4 I hear the Court to be saying it's the Court's  
5 understanding that the plaintiffs should have had every  
6 single conceivable alternative design disclosed in  
7 Dr. David's report. You know, I guess that, and that's  
8 certainly the Court's sense. So, you know, I respectfully  
9 disagree with that, but I certainly hear the Court, and I  
10 won't belabor the point.

11 THE COURT: No, you know, and I'm not picking on  
12 you. I'm trying to really understand where we are and the  
13 basis of the argument, but, again, the last point about, you  
14 know, Ms. Axline's surgery was in 2009, so, you know, some  
15 of these alternatives weren't available. That's certainly  
16 true or it could be true. But that's, you know, that's a  
17 question of when it comes down to actually decide what  
18 evidence gets in at trial. That gets managed in motions in  
19 limine it seems to me.

20 MS. ZIMMERMAN: Absolutely. And, you know, I mean  
21 in some states a prototype or, frankly, an idea is  
22 sufficient for reasonable alternative designs. And so we  
23 certainly I mean we can have maybe some ideas about certain  
24 prototypes, but we don't know every single idea that was out  
25 there. We know some that were in some of the documents that

1       were produced to us, and those were included in Dr. David's  
2       report. And, you know, plaintiffs may well just have to  
3       explore the alternatives that the defendants were aware of  
4       through the defendant's own witnesses, and we'll certainly  
5       take the opportunity to do that if afforded that.

6               THE COURT: Right. And that's the other issue  
7       sort of under-coursing this whole discussion is what we're  
8       really arguing about is the form of the evidence at the  
9       trial, which is to say you may not be allowed to call an  
10      expert to say this was out there. In my opinion, it was a  
11      good feasible alternative. It should have been used.

12             MS. ZIMMERMAN: Absolutely.

13             THE COURT: But at least today it certainly isn't  
14      my place to decide this, and it won't be, but today nobody  
15      is saying, well, you don't get to ask the defendants if they  
16      knew that cotton blankets existed, right? I mean that comes  
17      down to a difference in form. You want to be able to have  
18      an expert with the fancy credentials say all of this.

19             MS. ZIMMERMAN: Right.

20             THE COURT: But that's different from saying you  
21      don't get to cross examine the defendants about their  
22      knowledge.

23             MS. ZIMMERMAN: Right. And without, again,  
24      relitigating what we're going to do, we had some issues  
25      where we were precluded from doing that because the



1 witnesses were not experts so, again, a reason to supplement  
2 Dr. David's report. But I think we'll fight that fight down  
3 the road.

4 THE COURT: Right. And, of course, you know, I  
5 mean obviously I don't have as deep and broad a knowledge of  
6 all the proceedings that went on before this, so motions in  
7 limine that may have played in here, you know, some of it  
8 may be as something I'm unaware of now, but I don't think it  
9 really matters to the decision that I'm being asked to make  
10 but.

11 MS. ZIMMERMAN: And I did bring extra copies if  
12 the Court would like them of some of the defendant's expert  
13 report that really touch on general causation issues. And  
14 so to the extent that the Court is issuing or considering  
15 issuing an order that's going to strike general causation  
16 supplements from Dr. David and/or Dr. Nathan, we certainly  
17 would request as I'm standing here, we move the Court that  
18 the same rule be applied to the defendant's experts as well.

19 THE COURT: Well, I think you can rely on -- I  
20 think you can take comfort in the notion that the rule will  
21 be applied, whatever the rule is, it will be applied even-  
22 handedly and to both parties. I can't make any kind of  
23 statement about what the defendants have produced without a  
24 formal motion and without study of what's produced. So if  
25 you think they're over the line, and if in response to

1       whatever we rule on this motion, you think that line clearly  
2       plays in your favor, then I encourage you to bring the  
3       motion. Okay?

4               MS. ZIMMERMAN: Thank you, Your Honor.

5               THE COURT: Okay, thank you, Ms. Zimmerman.

6               Ms. Young? So I have a question for you. Come on  
7       up. Why isn't Dr. Bushnell's report impeachment?

8               MS. YOUNG: So, Your Honor, listening to that  
9       exchange, in my view, every answer took us right back into  
10      cross-examination of an expert. And so if we were to  
11      suddenly open the door and have this new found impeachment  
12      expert, this would be a never ending, frankly, a lot of sand  
13      bagging. The whole point of expert discovery is you have a  
14      full and fair opportunity to understand the opinions of the  
15      expert.

16              And to Ms. Zimmerman's point that Dr. Bushnell is  
17      now somehow needed to allow them to better cross examine  
18      Dr. Abraham or discredit him, she talks about only having  
19      access to the video on You Tube. Well, after science day,  
20      plaintiffs subpoenaed Dr. Abraham and his CFD file was  
21      produced to them in the fall of 2016, which was before any  
22      CFD expert was in the case.

23              So to the extent they want to run software, figure  
24      out what calculations were done, that was available to Dr.  
25      Elghobashi in the first instance or to Dr. Bushnell if they

1 wanted to engage him prior to that. And also Dr. Bushnell  
2 was at Dr. Abraham's deposition. To the extent that lawyers  
3 need expertise that is beyond what most of us understand, it  
4 was our understanding he was actually helping manipulate the  
5 software to assist in their cross-examination.

6 So we think that is just, one, admonished by the  
7 Court as Your Honor pointed out by Judge Noel no  
8 sur-rebuttals, and it just opens the flood gate here. MDL  
9 or not, there is just simply nothing in the federal rules in  
10 this Court's scheduling order that would allow for this type  
11 of sur-rebuttal, which is just cross examine under a  
12 different name.

13 Your Honor, very briefly, then, just on the point  
14 as to what general causation is and isn't here. I think  
15 based on the Court's comments, there is -- we're on the same  
16 page on that. I do want to just point out that as  
17 plaintiff's know, fact discovery was much broader than  
18 issues of general causation. They delved into regulatory  
19 issues, alternative design, deposed I think it was 20  
20 witnesses of 3M's. There was nothing about that whole phase  
21 of the case that would have suggested to either party that  
22 we were simply talking about whether Bair Hugger was capable  
23 of causing an infection, and so that I don't think more  
24 needs to be said on that.

25 And then just one final point, Your Honor, again,

1 where I think I started the argument is that what's before  
2 the Court today are two specific experts at this procedural  
3 posture in the case. What I hear plaintiff saying is we  
4 want relief potentially from the earlier scheduling order.  
5 There may come a time where we need to do more on general  
6 causation. These experts report in the Axline bellwether  
7 case 90 days or so before trial simply could not be that  
8 mechanism to visit that issue, and so we believe that these  
9 experts should be excluded at this juncture, and that would  
10 be all I have to say.

11 THE COURT: Thank you.

12 MS. YOUNG: Thank you.

13 THE COURT: Okay. It is 10:21. I'm going to take  
14 a brief recess. I think, you know, obviously, you're three  
15 months from trial. You have a lot of things going on. It  
16 strikes me that it would be wise to get this ruling out as  
17 quickly as possible so everyone knows the playing field.  
18 And I want to go review my notes, and I'll decide whether  
19 I'm going to rule today from the bench, so that you know  
20 that, or whether I think it really needs to wait for a more  
21 fulsome written order. But if I do rule from the bench, I  
22 will follow it up with at least a written order that lays  
23 some of this out. And I will articulate a rationale as well  
24 on the record if I do that. Okay?

25 All right. So why don't we reconvene at 10:35.

1 Okay, thank you. Court is in recess.

2 (Short recess at 10:22 a.m.)

3 (In open court at 10:37 a.m.)

4 THE COURT: Please be seated.

5 All right. Good morning again, everyone. We're  
6 on the record in the Bair Hugger Forced Air Warming Devices  
7 Products Liability Litigation MDL 15-2666. I will give you  
8 the benefit or the detriment as the case may be of what I  
9 think is the proper ruling here.

10 Let me say to both sides, I appreciate the  
11 arguments. They were well conceived. I appreciate the  
12 briefing. I think the issues are interesting and well  
13 prepared, and I felt like the Court was well informed on  
14 everything. So thank you to all of you on that.

15 And, you know, without further ado, I will grant  
16 the defendant's motion and exclude both the Bushnell report  
17 and Dr. David's supplemental report. And I will give you my  
18 rationale for doing that. The rationale is slightly  
19 different as to each or maybe not slightly but different as  
20 to each.

21 By way of general background, I do generally agree  
22 with the defendant's characterization of sort of the  
23 backdrop against which these motions get played out. The  
24 Court did set deadlines for disclosure of general causation  
25 experts. They set those deadlines first in pretrial order

1 number 4, and then that was amended in pretrial orders 13,  
2 17, 20, 21, 22, and 26, but the operative date for purposes  
3 of these motions was the initial disclosure date, which did  
4 not change after I believe pretrial order 17, and that date  
5 was March 31 of 2017. So and, you know, obviously, there's  
6 no question that the reports at issue today were served  
7 after that date.

8 The Court in its scheduling orders and as  
9 clarified, I think, or amplified in its status conferences  
10 really distinguished between reports on general causation  
11 was the phrase that was used and case specific causation,  
12 but as reflected not only in the pretrial orders, but also  
13 in the status conferences of September 8th of 2016 and  
14 June 15th of 2017. What the Court really distinguished was  
15 between expert reports that were general in nature, that is  
16 cross cutting on a wide variety of, if not the majority of,  
17 cases in the MDL, so general issues as distinct from  
18 opinions that would be specific to a particular case. And  
19 the example that was used both by I think Judge Noel, but  
20 also in response to Judge Noel and in correspondence with  
21 the Court is that an example of the case specific expert  
22 opinion would be an orthopedic surgeon or a treating  
23 physician who would come in and say something about in this  
24 example Ms. Axline's surgery or Ms. Axline's infection.  
25 There's no question that general causation experts can also

1 issue case specific opinions, but they have to be case  
2 specific opinions. And I think it was very clear what  
3 distinction the Court was making as well as very clear that  
4 in its orders, the Court would not allow sur-rebuttal  
5 reports.

6 So with that sort of background in mind, I turn to  
7 these two reports. Dr. Bushnell's report, I think the  
8 plaintiff's wisely concede that it is obviously a direct  
9 response to the report of the defendant's expert  
10 Dr. Abraham, and it's unabashedly a rebuttal to that report.  
11 Dr. Abraham's report was, of course, a rebuttal to the  
12 initial report by Dr. Said Elghobashi.

13 So by definition, Dr. Bushnell's report is a  
14 sur-rebuttal, and it's not permitted by the Court's pretrial  
15 orders, and it's, in fact, prohibited by the Court's  
16 pretrial order. And I'll note that it doesn't reference  
17 Nancy Axline or the specifics of her case or attempt to do  
18 any computational fluid dynamics with respect to her surgery  
19 suite or her operation.

20 It could have been done earlier. I am persuaded,  
21 first of all, by the defendants that the information which  
22 Dr. Bushnell wants to critique Dr. Abraham on was available  
23 to the plaintiffs in advance of the initial report.  
24 Certainly, it's been available for over a year now. To the  
25 extent that the plaintiffs argue that it really ought to

1       come in as impeachment, I understand the argument. I would  
2       say that in my view it's not really classic impeachment  
3       certainly, and even if it's characterized as impeachment, if  
4       reports by experts and testimony by experts were allowed to  
5       come in under the guise of I'm impeaching the credibility of  
6       the other expert, than it really would eviscerate the limit  
7       that the Court placed on an initial round and then a  
8       rebuttal round and no sur-rebuttals.

9               So the conclusion from all that is that  
10       Dr. Bushnell's report, I think, violates the pretrial  
11       scheduling order and is excludable both under Rule 37B2A2,  
12       and under Rule 16F1C.

13              You know, all of that is not to say I'm not  
14       suggesting that Dr. Bushnell's critique or the impeachment  
15       that counsel wants to make of Dr. Abraham is somehow not  
16       available to them on cross-examination or somehow is not a  
17       fair subject for examination of Dr. Abraham. But I don't  
18       think it's not available to them in the form of an expert  
19       who takes the stand and puts their imprimatur of their  
20       credentials and opinions on top of the impeachment. The  
21       evidence itself may or may not come in, but it's not going  
22       to come in in the form of Dr. Abraham or Dr. Bushnell's  
23       report. I appreciate the dilemma that counsel faced, and I  
24       think certainly plaintiff's counsel is to be complimented  
25       for making the disclosure but that doesn't change the



1 result.

2 As to Dr. David's report, it's not, I guess I  
3 would not see it as an impermissible sur-rebuttal, though I  
4 suppose one could characterize it that way. It's really a  
5 question of supplementation because it really amplifies and  
6 expands on his initial report as to feasible alternative  
7 designs by adding I think it's six or so other alternative  
8 designs. But those feasible alternative designs were  
9 properly the subject of the plaintiff's initial expert  
10 reports, and so the question really turns on whether this is  
11 a proper supplementation, and I find under the rules that  
12 it's not for the following reasons:

13 The newly disclosed designs did exist at the time  
14 of the initial report. The studies that Dr. David  
15 references in support of those alternative designs were all  
16 published prior to his report with the exception of the one  
17 that was published after his report but prior to the  
18 deposition. So it's not a supplementation based on new  
19 information, new studies, new things that could not have  
20 been disclosed initially.

21 As to the rationale that the plaintiffs argue that  
22 the Court's ruling on the motion in limine in Gareis and  
23 then as described, it's retrenchment of that ruling, somehow  
24 opened the gate to additional feasible alternative designs  
25 is unpersuasive for a couple of reasons.

1 First of all, before the initial order, at least  
2 as I understand the facts, Dr. David had in fact disclosed  
3 the device or the alternative designs that were later  
4 excluded. So certainly additional such designs or I think  
5 they were described as patient conductive warming devices  
6 could have been disclosed at the time of his initial report.

7 As to the argument that it's premature to disclose  
8 the full range of potential feasible alternative designs  
9 because the law that will be applied to each individual case  
10 may be different, again, I find that unpersuasive because  
11 the law was certainly known, and there's no argument that  
12 there's been a sea change in the law since the time of  
13 Dr. David's initial report. So I think the upshot is it's  
14 really incumbent on the plaintiff, and I understand it may  
15 seem an undue burden, but I don't think it is, and I think  
16 it's certainly a burden that is imposed by the Court's, the  
17 structure of its scheduling orders, that it's incumbent on  
18 the plaintiff with respect to an issue such as feasible  
19 alternative design to give us fulsome an opinion as they can  
20 at the time about what alternative designs exist, what are  
21 out there, and what could be alternatives.

22 So going back to my earlier point about Gareis  
23 though, I think it can't be said that the relevance of these  
24 after disclosed devices, the ones that are now in  
25 Dr. David's newest report, that the relevance or the need or

1 desirability to disclose those only came to plaintiff's  
2 attention as a result of the Gareis order or trial.

3 I do find -- so I don't think there's a  
4 justification, a substantial justification for the  
5 supplementation. And I do find that plaintiff is prejudiced  
6 by the disclosure, either they can't take additional  
7 discovery, or if they can, it is requiring them to do so on  
8 the eve of trial and to undertake substantial investigation  
9 as the case careens toward trial.

10 And by way of legal support for this ruling, I  
11 would rely on, I do rely upon the *3M v. Dow* case reported at  
12 2005 Westlaw, 6007042. The *Medtronic* case that's reported  
13 at 2008 Westlaw, 4601038. The *Cook* case reported at 580 F.  
14 Supp. 2d 1071, and there are others, so I rely on those, but  
15 the gist of it is under Rule 37(c)(1), I do think that  
16 Dr. David's report needs to be excluded.

17 One last comment on his report and that is  
18 regarding the nature of MDLs, I understand that, yes, as the  
19 case, as a particular case gets ready for trial, the fact  
20 that it is governed by the law of a particular state will in  
21 fact govern how, you know, what precisely is admissible and  
22 what precisely the parties decide to utilize in their trial  
23 and that the function of bellwethers is in fact among other  
24 things to educate the parties on what was persuasive and  
25 what wasn't and to change or amend their presentation and

1       their evidence.

2               But that argument goes too far if it is a  
3       justification for saying that an expert can disclose a few  
4       feasible alternative designs and then disclose as many  
5       feasible alternative designs when a particular case gets  
6       ready for trial. I think that would essentially undermine  
7       the efficiency of an MDL and the purpose of staggering  
8       discovery as between general issues and case specific  
9       issues.

10              So I hope that gives you some guidance. I hope  
11       that you understand the Court's rationale. I will follow  
12       this up with some level of written order, but you should  
13       understand the rationale as I've given it here. The order  
14       will not perhaps be as long as it would in the ordinary  
15       course because I want to make sure that you can get on up to  
16       Judge Ericksen if you choose to do that. And if you don't  
17       choose to do that at least, then you have a guide post for  
18       what's going on in the future. Okay?

19              So anything further for the plaintiffs,  
20       Ms. Zimmerman?

21              MS. ZIMMERMAN: No, Your Honor.

22              THE COURT: All right. Thank you.

23              Ms. Young, anything further for the defendants?

24              MS. YOUNG: No, thank you, Your Honor.

25              THE COURT: Okay. Thank you all. Court is in

1 recess.

2 (Court adjourned at 10:55 a.m.)

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5  
6 REPORTER'S CERTIFICATE

7  
8 I, Maria V. Weinbeck, certify that the foregoing is  
9 a correct transcript from the record of proceedings in the  
10 above-entitled matter.

11  
12 Certified by: s/ Maria V. Weinbeck

13 Maria V. Weinbeck, RMR-FCRR  
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